KELLY E. HUGHES
SHARON C. HUGHES

IBLA 93-117, 93-123 Decided April 5, 1996

Appeals from decisions of the Yuma District Office, Bureau of Land Management, setting new rental for agricultural leases AZA 22508 and
AZA 22512.

Set aside and remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976: Leases

When granting an interest in public land such as an agricultural lease to private citizens, the Department is required under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), to obtain fair market value. However, the value of authorized improvements owned by anyone other than the United States is not included in the determination of fair market value.

2. Appraisals--Federal Land Policy and Management Act of 1976: Leases

Generally, appraisals will not be set aside on appeal unless an appellant is able to show error in the appraisal method used by BLM or demonstrate by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

3. Appraisals--Federal Land Policy and Management Act of 1976: Leases

The exclusion of improvements from appraised value is based on their removability and the lack of government ownership. Although pumps and other well equipment may be removable, the availability of water is not usually an improvement that can be removed, and BLM may properly consider that factor as distinguished from the physical equipment of the well in appraising the land.

4. Appraisals--Federal Land Policy and Management Act of 1976: Leases

Where the record in an appeal from a rental appraisal not only refutes the appellants' argument that the rental is too high but shows that BLM's rental rates are based on inadequately justified downward adjustments from comparable transactions, the decision is properly set aside and the case remanded to BLM either to establish higher rates in alignment with comparable transactions or provide justification for any downward adjustment.

APPEARANCES: Kelly E. Hughes and Sharon C. Hughes, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

We have consolidated appeals by Kelly and Sharon Hughes from two decisions of the Yuma, Arizona, District Office, Bureau of Land Management (BLM), dated November 17, 1992. One decision approved agricultural lease AZA 22508 with an annual rental rate of $120 per acre. The other decision approved assignment of lease AZA 22512 to the Hughes from Raymond and Frances Quon and established an annual rental rate of $90 per acre. 1/

Kelly Hughes succeeded his father, F. Earl Hughes, who farmed these two parcels and a third adjacent parcel, AZA 22511, since the 1940's. 2/ These three parcels of land are situated at the southwesternmost corner

1/ The appeal concerning lease AZA 22512 was assigned docket number IBLA 93-117; the appeal concerning lease AZA 22508 was assigned docket number IBLA 93-123. Lease AZA 22512 is a 148.70-acre parcel whose total annual rental is $13,383 based on BLM's $90 per acre rate. Lease AZA 22508 is a 88.50-acre parcel whose total annual rental is $10,620 based on BLM's $120 per acre rate.

2/ Appellants' Statement of Reasons refers to the third parcel, AZA 22511, but we have no jurisdiction to consider BLM's appraisal of that parcel with these appeals. Although the serial register page from the case file for that parcel indicates the filing of a notice of appeal on Dec. 16, 1992, there is no indication that BLM issued any decision affecting that parcel from which a December 16 appeal would have been timely. Under Departmental regulation 43 CFR 4.411(c), the timely filing of a notice of appeal is a jurisdictional requirement and the failure to file timely precludes consideration of an appeal. Ahtna, Inc., 100 IBLA 7 (1987); TCG May 1983, 94 IBLA 22 (1986); Oscar Mineral Group #3, 87 IBLA 48 (1985). The BLM decision that most immediately preceded appellants' December 16 notice of appeal was a May 4, 1992, decision approving the assignment of the lease from Hulsey to Hughes. The $90 rental rate of which appellants complain was established in a Jan. 17, 1992, decision BLM issued to Hulsey, who was then the lessee of record and who did not appeal it. Our disposition of these appeals does not affect the rate established for parcel AZA 22511.

of Arizona along the Colorado River and the border with Mexico. For many years, trespassers farmed public land along the Colorado River. These included Earl Hughes, who watered his parcel by pumping water from the Colorado River until he placed a well on parcel 22508 in 1956. In 1961, the Department brought trespass actions against the farmers; these actions were settled by agreements establishing payment schedules for trespass damages and providing for permits for the former trespassers to continue farming the land. The trespasses on parcels now designated as 22508, 22511, and 22512 were resolved in an action against Hughes, H.E. Bilbrey, and Raymond Quon in which a judgment was entered pursuant to a stipulation of the parties. United States v. Hughes et al., No. Civ 3346 Phx (Dec. 4, 1961). Leases for parcels 22508, 22511, and 22512 were issued to Hughes, Bilbrey, and Quon, respectively, and Bilbrey and Quon subleased their parcels to Earl Hughes and later to Kelly Hughes. The Bilbrey parcel, 22511, was later leased to Hulsey who assigned his lease to Kelly Hughes in 1992. See n.2, supra.

When BLM makes an appraisal for the purpose of determining the rental rate for a parcel, an appraisal based on comparable transactions is deemed more reliable if there is adequate data. C Bar C Ranch Partnership, 132 IBLA 261, 265 (1995); Communications Enterprises, Inc., 120 IBLA 146, 149 (1991). The appraisal report on which BLM based its decisions in these appeals recommends rental rates for 25 agricultural leases, including the two subject parcels. 3/ The 25 parcels lie in the Colorado River portion of Arizona and California with individual sites in the areas of Yuma, Arizona, Needles, California, and Palo Verde, California. The two parcels involved in this case were appraised on the basis of the Yuma Rental Rate Summary, which analyzes 21 comparable leases in North Gila Valley, Yuma, and Somerton/Gadsden, Arizona. BLM's appraisal report indicates that the annual unadjusted per-acre rental rates for agriculture uses in the Yuma area can range from $75 to $515, with the lower rates reflecting scarce water and poor growing capacity and with higher rates reflecting one-crop speculative growing conditions (Appraisal Report at 11). The report observes that "BLM is not able to use the same speculative practices [e.g., continuous growing] when leasing the public land" and therefore "sizeable adjustments" of the rents for such one-crop areas are necessary for determining the fair market value of the public lands:

> After considerable adjustment, the higher rates do manage to reflect a suggested rental range of $150 to $200/Ac for land with a good source of water, and above average growing potential.

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3/ Appraisal of Public Lands as Applied to Agriculture Uses Administered by the Yuma District, Bureau of Land Management, and Recommendations for Fair Market Rental Fees Covering Agriculture Leases in the Colorado River Portion of Arizona & California with Individual Sites in the Areas of Needles, Palo Verde, California and Yuma, Arizona, as of Aug. 14, 1991, Prepared by Dave Beine.

> Without an assured water source, larger downward adjustments suggested a range of $75 to $150/Ac/Yr for the BLM administered lands
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> It is the appraisers' opinion that most of the BLM administered agriculture parcels are marginal growing lands, with minimal assured water sources, and therefore they require sizeable downward adjustments when compared to the more productive private leases found in the Yuma/Bard/Gila valley areas. [Emphasis in original.]

(Appraisal Report at 11).

Appellants assert that BLM's rental rates are excessive because they are based on the availability of water from the Earl Hughes well on parcel 22508 that they maintain at their own expense. Appellants refer to the BLM's description of the rights appraised as based on "unimproved farm land, since improvements provided (if any) do not belong to the government, and the permittee has a contractual obligation to return the property to its prior condition, should the lease or permit be terminated for any reason" (SOR at 3, quoting Appraisal Report at 1). Appellants assert that the parcels should be evaluated as undeveloped desert land.

In the Yuma Rental Rate Summary, Comparable lease no. 7 is actually the Hughes' sublease of parcel 22512 from Quon for $182 per acre annually. Comparable lease no. 8 is the Hughes' sublease of parcel 22511 from Hulsey for the same amount. BLM, however, appraised each of these parcels at $90 per acre. The assignments to Hughes of the Hulsey and Quon leases may have been prompted in part by the fact that a new lease provision, section 3.L.4., requires the lessee to pay to BLM rental amounts collected from a sublessee in excess of the rental rate in BLM's leases. Under this provision, Hulsey and Quon would not have been able to keep the difference between the rental they were paying BLM and the $182 per acre that Kelly Hughes was paying them. In effect, BLM's decision approving the assignment from Quon and setting a $90 per acre rental enables appellants to pay less than half the rental they were previously paying, but appellants nevertheless contend that $90 is excessive.

[1] When granting an interest in public land such as an agricultural lease to private citizens, the Department is required under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), to obtain fair market rental value. 43 CFR 2920.0-6(a), 2929.8; Russell A. Beaver, 121 IBLA 386, 393 (1991); Sierra Production Service, 118 IBLA 259, 262 (1991); Phyllis E. Lewis, 113 IBLA 376 (1990). However, the value of authorized improvements owned by anyone other than the United States upon the lands involved shall not be included in the determination of fair market value. See 43 CFR 2710.0-6(f).

[2] Generally, appraisals will not be set aside on appeal unless an appellant is able to show error in the appraisal method used by BLM or demonstrate by convincing evidence that the charges are excessive.

Russell A. Beaver, supra at 392, and cases cited. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Id.

In Beaver, we rejected the appellants' argument that land for which BLM issued agricultural leases should be appraised as if it were undeveloped desert land and affirmed an appraisal based on comparable leases of land whose highest and best use was agriculture. In that case, the lessees similarly raised the argument that BLM's appraisal was improperly based on their improvements, but BLM responded that the lessees had allowed the lease to lapse before renewing it so that title to the improvements vested in the United States. Id. at 392. In this case, the well was originally developed in 1956 by trespassers, and a similar argument for basing the appraisal on the well may be made because, unlike other improvements subsesquently added when the land was under lease, the well belonged to the United States from its inception. In Kernco Drilling Co., 71 IBLA 53, 56 (1983), we stated: "A trespasser * * * is not in privity with the landowner, and if the trespasser installs equipment on the land, he forfeits title to it at the moment of its installation * * *. See 1 G. Thompson, Real Property § 64 (1964)."

[3] Nevertheless, BLM placed no value on the well's physical equipment when conducting the appraisal; appellants placed the present pump on the land after the lease was in effect and may remove it. As recognized by the portion of the appraisal report quoted by appellants, the exclusion of improvements from appraised value is based on their removability and the lack of government ownership. Although the pumps may be removed, the availability of water is not an improvement that appellants can remove, and BLM may -- and did -- properly consider that factor when appraising the land. BLM's decision in each case explains how the value of the availability of water is not merely an issue involving a physical improvement to the land:

> The Arizona Department of Water Resources has indicated that there is not a permanent source of water available for the subject parcel. However, the Department's position on the pumping of ground water below Morelos Dam has not changed and pumping can continue. The ground water pumping will be reviewed every 3 years to determine if the water use can be continued. The requirement for a legally obtained source of water * * * is satisfied for this 3-year lease period.

The distinction between the value of a well as an improvement and the value of availability of water is more easily understood by realizing that if BLM did not recognize that water could be lawfully drawn from the well, appellants' pumping equipment would impart no value to the land. Appellants would have to obtain water elsewhere, and the value of the parcels would be correspondingly diminished. The fact that appellants have equipped the well is no reason for setting aside BLM's appraisal.

We sustained BLM's appraisal in Beaver not merely because of our resolution of the issue of improvements but because the appraised values corresponded to "[t]he most compelling indication of the correctness of BLM's appraisal, [i.e.,] the rental charged by appellants of its sublessees." Id. at 396. As stated above, appellants subleased parcel 22512 for $182 per acre. 4/ Although this appeal differs from Beaver because appellants in this case were sublessees rather than sublessors, this difference does not diminish the probative weight of the sublease rental as evidence of fair market rental value. There is no indication that the rights appellants subleased from Quon and Hulsey were greater than the rights Quon and Hulsey leased directly from BLM. Although appellants argue that a $90 per acre annual rental for the Quon Parcel is too high because that parcel has no water (except that which came from appellants' well), they freely paid Quon twice that amount. Appellants' payment of $182 rental for a parcel that had no water constitutes evidence of fair market value that is not based on their well, unless appellants can demonstrate that they were paying Quon for their own well. 5/ Otherwise, BLM's appraisal gives no valid reason why BLM should accept less from appellants than what they paid the Quons, i.e., $182 per acre per year. That this parcel is "a marginal farm operation requiring above average management skills" appears to be a factor already comprehended in the $182 rate so no downward adjustment is justified for this reason. The fact that Hughes is a farmer of superior skill means that he would not be paying Quon for those attributes, so no downward adjustment would be warranted for that reason. Transactions reported by BLM show that better land requiring less skill commands significantly higher rental in the marketplace, and the Appraisal Report corroborates that the $182 rate paid by Hughes to Quon more closely approximates the fair market value than $90. 6/ Thus, although appellants contend that BLM's appraisal errs

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4/ Appellants subleased the adjacent Hulsey parcel also for $182 per acre per year but now lease that parcel from BLM for only $90 per acre per year. BLM's appraisal of the former Hulsey parcel is not within our jurisdiction. See n.2, supra.

5/ We note that the Appraisal Report indicates a total of $6,000 as Quon's share of well expenses. Appraisal Report, supra note 3, Vol. III, Comparable Lease and Appraisal Support Data, Comparable Leases No. 1 through 21 Covering North Gila Valley, Yuma and Somerton/Gadson [sic], Arizona, Comparable Lease No. 7 (50), Remarks. It is not clear that the $182 rental was intended to reimburse Quon for this expense, however.

6/ For the comparable leases in the Yuma area used by BLM, the per acre rental value for leases for good land (comparable lease nos. 1,2,3, and 4) approached or exceeded $300. Five parcels described as difficult or marginal could nevertheless still command $150 or more. These difficult or marginal comparables included comparable lease nos. 5, 13, and 20 in addition to the parcels subleased by Quon and Hulsey to Hughes. At the end of BLM's appraisal report, chart A from a series labeled "Extraction of Market Data Comparison Adjustment Using Paired Data Sets" suggests

by being too high, in our view the problem is that BLM did not adequately justify rental rates as low as $90 per acre for lease 22512 or $120 per acre for 22508.

[4] When a timely appeal subjects a BLM decision to this Board's jurisdiction, our review authority is de novo in scope because it is our delegated responsibility to decide for the Department "as fully and finally as might the Secretary" appeals regarding use and disposition of the public lands and their resources. 43 CFR 4.1; Richard Bargen, 117 IBLA 239, 245 n.3 (1991); United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983). The Board's authority to correct or reverse an erroneous decision by the Secretary's subordinates or predecessors in interest and to decide cases on issues other than those advanced by parties has been judicially recognized. Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); see Ben Cohen (On Judicial Remand), 103 IBLA 316, 328-29, aff'd sub nom., Sahni v. Watt, Civ. No. S-83-96-HDM (D. Nev. Jan. 17, 1990), aff'd, (Jan. 14, 1991), aff'd, No. 91-15398 (9th Cir. Apr. 27, 1992) (disposition of a land selection application on a basis other than that for which the case was remanded).

In this case, this Department operates under a statutory mandate to collect from the lessees no less than the fair market value for the leases in question, as stated above. Where the record in an appeal from a rental appraisal not only refutes the appellants' argument that the rental is too high but shows that BLM's rental rates are based on inadequately justified downward adjustments from comparable transactions, the decision is properly set aside and the case remanded to BLM either to establish higher rates in alignment with comparable transactions or provide justification for any downward adjustment. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions

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fn. 6 (continued)
that the $182 rental that Hughes paid Quon already reflected a $93 downward adjustment from a $275 comparable lease because the Quon parcel
lacked access to irrigation district water and relied on the well on adjacent parcel 22508.

7/ In other cases, appealing a decision has affected appellants more adversely than the decisions they appealed. In Ralph E. Pray, 105 IBLA 44, 48 (1988), for example, we not only affirmed BLM's rejection of part of
an appellant's mining plan of operations, but, on the basis of our de novo review authority, we directed BLM to review that part of Pray's mining plan of operations which was previously approved using the correct standard.
In Vincent Barnard, 66 IBLA 100 (1982), we not only affirmed a BLM decision requiring a reservation of oil and gas in a patent but also required BLM
to reserve additional minerals it had failed to reserve in its decision.

appealed from are set aside and the cases remanded for further action consistent with this opinion.

Will A. Irwin
Administrative Judge

I concur:

John H. Kelly
Administrative Judge